

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FRANCENE GREWE and LORI EBERHARD, on behalf of themselves and all others similarly situated,

No. 2:16-cv-00577

Plaintiffs,

V.

COBALT MORTGAGE, INC.,

Defendant.

JOINT MOTION FOR FLSA
COLLECTIVE CERTIFICATION AND
SETTLEMENT APPROVAL

**NOTE ON MOTION CALENDAR:
May 6, 2016**

NO ORAL ARGUMENT REQUESTED

Plaintiffs Francene Grew and Lori Eberhard (“Plaintiffs”) and Defendant Cobalt
age, Inc. (“Cobalt”) jointly move the Court to grant the parties’ Joint Motion for FLSA
tive Action Certification and Settlement Approval. Following a pre-dispute mediation,
ties reached a settlement in this case, and now jointly move the Court for (1) FLSA
cation of the collective action; (2) approval of the settlement; and (3) approval of the
notice and claim form. The Court should grant the parties’ Motion because their
ment is a fair and reasonable resolution of the parties’ bona fide disputes as to liability and
es under the federal Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 201, *et seq.*

I. RELEVANT BACKGROUND

2 In January 2016, plaintiffs' counsel Rowdy Meeks contacted Cobalt's counsel and
3 alleged that Cobalt violated the FLSA by failing to pay former Production Partner Ms. Grewe
4 and former Mortgage Loan Officer Assistant ("MLOA") Ms. Eberhard for all overtime hours
5 worked. Declaration of Taylor Ball in Support of Joint Motion for Collective Action
6 Certification and Settlement Approval ("Ball Decl."), ¶ 2. Plaintiffs further alleged that Cobalt
7 also failed to pay all other Production Partners and MLOAs in the United States for all overtime
8 hours worked. *Id.* The parties agreed to mediate the case before Plaintiffs filed their complaint
9 because the parties had recently settled a similar loan officer FLSA overtime case which Judge
10 Coughenour fully approved.¹ *Id.* ¶ 3.

11 The mediation for this case occurred on March 10, 2016, with Theresa Wakeen, a
12 respected mediator in complex wage and hour class action litigation. Ball Decl. ¶ 4. Ms.
13 Wakeen likewise mediated the *Wheeler* case so she was familiar with some of the issues and
14 parties in this case. *Id.* Before the mediation, the parties exchanged information, data, and
15 documents necessary to fully and fairly evaluate the putative collective members' claims,
16 including employees' dates of employment, weeks worked in the relevant time period, and
17 compensation data. *Id.* ¶ 5. Plaintiffs' counsel also was familiar with various aspects of Cobalt's
18 operations and compensation structure based on a prior wage-and-hour collective action he
19 litigated against Cobalt in 2015. *See id.* Thus, the parties' respective counsel had sufficient
20 information in advance of the mediation to fully analyze the claims and defenses at issue in this
21 case. At the mediation, the parties reached agreement on the terms of a settlement agreement,
22 including agreement as to FLSA collective action certification, and the form and manner of
23 judicial notice to putative collective members. *Id.* ¶ 4.

²⁵ ¹ That case was entitled *Shannon Wheeler, on behalf of herself and all others similarly situated, Plaintiff, v. Cobalt*
²⁶ *Mortgage, Inc., Defendant, U.S.D.C., W.D. Wash., No. 2:14-cv-01847-JCC.* Ball. Decl. ¶¶ 3, 5. Ms. Wheeler
²⁷ alleged that Cobalt failed to pay her and all other employees called Mortgage Loan Originators in compliance with
the FLSA. *Id.* ¶ 5. In June 2015, the parties reached an agreement to settle that case on a collective basis, and on
October 16, 2015, Judge Coughenour approved that settlement. *Id.*

1 **II. SUMMARY OF THE PARTIES' SETTLEMENT AGREEMENT**

2 **A. Gross Settlement Amount.**

3 The parties' settlement agreement here is very similar to the settlement agreement the
 4 parties reached in the *Wheeler* case and which Judge Coughenour fully approved. The
 5 settlement agreement provides that Cobalt will pay a total of \$650,000 to settle this litigation
 6 ("Gross Settlement Amount"). *See* Settlement Agreement (attached as Exhibit 1 to this Motion),
 7 at ¶ 7.1. This is the maximum that Cobalt will pay to provide cash compensation to Plaintiffs
 8 and all opt-in plaintiffs, and to pay administrative costs, plaintiffs' counsel's attorneys' fees,
 9 litigation costs, and incentive awards. *Id.* ¶¶ 7.1, 8.1, 10.1, 10.2. Cobalt will also pay the
 10 employer's share of standard payroll deductions on the W-2 settlement amounts paid to Plaintiff
 11 and all opt-in plaintiffs in addition to the Gross Settlement Amount. *Id.* ¶ 12.2.

12 **B. Settlement Allocations.**

13 The individual settlement amount allocated to each opt-in plaintiff will be calculated as
 14 follows. First, each putative collective member's average weekly compensation will be
 15 multiplied by the number of covered weeks worked by the putative collective member during the
 16 relevant time period to determine that individual's points. Second, all putative collective
 17 members' individual points will be added together to determine the total points. Third, the Gross
 18 Settlement Amount – minus attorneys' fees, litigation costs, administrative fees, and service
 19 awards – will be divided by the total points to determine the net share of the fund per point.
 20 Fourth, the share of each putative collective member who opts in to the settlement will be
 21 determined by multiplying that individual's points by the net share per point. *See* Settlement
 22 Agreement ¶¶ 8.5.1-8.5.3.

23 Half of each opt-in plaintiff's allocation will be paid on a Form 1099 as liquidated
 24 damages and the other half will be paid on a Form W-2 as wages. Settlement Agreement ¶ 12.1.
 25 Employee-side taxes will be withheld from the W-2 portions of each opt-in plaintiff's settlement
 26 allocation and paid to the applicable taxing authorities. *Id.*

1 Each putative collective member will have the choice whether or not to opt-in and accept
 2 the settlement amount. Settlement Agreement ¶¶ 8.3, 8.4. Only those putative collective
 3 members who opt into the case and choose to accept the settlement will release their claims. *See*
 4 *id.* ¶ 9.2. Those putative collective members who choose not to opt in the case do not waive any
 5 claims and may maintain their own actions if they desire. *Id.*

6 Plaintiffs' counsel will separately move the Court to approve an attorneys' fee award of
 7 twenty-five percent (25%) of the Gross Settlement Amount plus reasonable litigation costs of
 8 approximately \$10,000. Settlement Agreement ¶ 10.1. Plaintiffs also will move for a service
 9 award of \$5,000 each for Plaintiffs Francene Grew and Lori Eberhard. *Id.* ¶ 10.2. These fees,
 10 costs, and awards are contemplated in the parties' settlement agreement, and Cobalt will not
 11 oppose them. To the extent the Court does not approve any portion of these amounts, any such
 12 remaining amounts will be included in the amount distributed to the opt-in plaintiffs.

13 **C. Notice and Claims Process and Settlement Administration.**

14 With the Court's approval, the Settlement will be administered by a third party
 15 administrator, Analytics LLC ("Settlement Administrator"). Settlement Agreement ¶ 8.1.
 16 Reasonable fees and expenses of the Settlement Administrator shall be deducted from the Gross
 17 Settlement Amount. *Id.*

18 With the Court's approval, the Settlement Administrator will mail the agreed upon
 19 Settlement Notice and Claim Forms to each putative collective member. Settlement Agreement
 20 ¶ 8.3. The parties request that the Court approve the notice and claim form, attached hereto as
 21 Exhibit 2 ("Notice and Claim Form"). The Notice and Claim Form fully explains the settlement,
 22 and includes information regarding each plaintiff's right to either (1) accept the settlement by
 23 submitting a signed claim form or (2) not respond and not be bound by any final judgment in this
 24 case. Notice and Claim Form ¶ 9.² The Notice and Claim Form notifies putative collective

25
 26 ² For putative collective members who worked in Washington, the Notice also explains how accepting the settlement
 27 payment will impact their rights in a lawsuit pending in Washington Superior Court entitled *Shari Bell-Beals, Alan
 Thain, and Eric Engelland v. Cobalt Mortgage, Inc., Keith D. Tibbles, and Charles E. Gehre*, King County Superior

1 member that they have thirty (30) days to postmark or otherwise return a signed claim form
 2 indicating his or her intent to accept the settlement. *Id.*

3 The Settlement Administrator will calculate individual settlement amounts within ten
 4 (10) days of the claim deadline, and the Settlement Administrator will then mail settlement
 5 checks to each opt-in plaintiff within twenty-five (25) business days following calculation. *See*
 6 Settlement Agreement ¶¶ 8.6-8.9. Settlement checks will remain negotiable for six months. *Id.*
 7 ¶ 8.10. Any uncashed checks after that date will be cancelled and the check amounts sent to the
 8 applicable state unclaimed property division. *Id.*

9 **D. The Parties' Positions on the Settlement Amount.**

10 The parties agree that the gross settlement amount represents a full and fair settlement of
 11 the claims in this case. Settlement Agreement ¶¶ 3.1-3.2.

12 Plaintiffs' counsel has diligently and thoroughly investigated the facts of the case and
 13 researched the legal issues involved. Based on his own independent investigation and evaluation
 14 into the claims and based on Cobalt's representations as to its financial viability, plaintiffs'
 15 counsel believes that settlement for the consideration and other terms set forth in the agreement
 16 is fair and reasonable and in the best interests of the putative collective members. While
 17 plaintiffs' counsel believes the claims asserted have merit, he recognizes and acknowledges that
 18 the time, cost, and burden to fully litigate this action would be significant. In reaching this
 19 Settlement, plaintiffs' counsel has also taken into account the uncertainty and risks inherent in
 20 any litigation, especially in complex collective actions such as this one. *See* Declaration of
 21 Plaintiffs' Counsel Rowdy B. Meeks in Support of Joint Motion for FLSA Collective
 22 Certification and Settlement Approval ("Meeks Decl."), ¶¶ 2-4.

23 Cobalt denies liability or wrongdoing associated with plaintiffs' claims. Furthermore,
 24 Cobalt believes that it has several defenses that would significantly limit the size of the putative
 25

26
 27 Court, No. 15-2-18157-2 SEA (filed July 28, 2015), which alleges the defendants failed to properly pay Production
 Partners and MLOAs (among others) all overtime owed under Washington law. Notice and Claim Form ¶ 10.

1 collective as well as potential damages in this case. Cobalt's position is that Production Partners
 2 and MLOAs generally did not work overtime or did not work a significant amount of overtime,
 3 and that some who did work overtime received overtime pay. Although Cobalt does not abandon
 4 the position it took in this action, it believes that continued litigation would be protracted,
 5 expensive, uncertain, and contrary to its best interests. Furthermore, Cobalt was sold to another
 6 company on November 4, 2014, prior to the filing of this lawsuit, and is currently winding down
 7 its corporate activities. Any settlement funds must come out of Cobalt's limited reserves, as
 8 operations have ceased. In light of these realities, Cobalt believes that the agreement is fair and
 9 reasonable and the best course of resolution of this action.

10 **E. Agreement to Certify the FLSA Collective Action.**

11 The parties agree, for settlement purposes only, to stipulate to the certification of a FLSA
 12 collective action of Putative Collective Members, defined in the Settlement Agreement as "any
 13 individual who worked as a non-exempt Production Partner or MLOA for Defendant at any time
 14 since March 1, 2013 and who did not previously execute a release of claims against Cobalt."
 15 Settlement Agreement ¶¶ 5.1, 1.18. Cobalt reserves the right to challenge the propriety of
 16 collective certification for any purpose in the event that the Court does not certify the collective
 17 action for settlement purposes.

18 **III. ANALYSIS**

19 **A. Collective Action Settlements Are Encouraged.**

20 There is a "strong judicial policy that favors settlements" and an "overriding public
 21 interest in settling and quieting litigation" particularly where FLSA collective and class action
 22 litigation is concerned. *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1278 (9th Cir. 1992) (reversal
 23 of settlement approval only upon clear showing of abuse of discretion); *Bronkhorst v. Safeco*
 24 *Corp.*, 529 F.2d 943, 950 (9th Cir. 1976) (public interest in containing the burdens of expensive
 25 class-action litigation favors settlement). Indeed, the Ninth Circuit "has long deferred to the
 26 private consensual decision of the parties" regarding the amount of settlement and "put[s] a good
 27

1 deal of stock in the product of an arms-length non-collusive negotiated resolution.” *Rodriguez v.*
 2 *W. Publ’g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009).

3 **B. This Court Should Approve The Parties’ FLSA Settlement Because It Is Fair
 4 And Reasonable.**

5 An FLSA collective action is not a class action – individuals participating affirmatively
 6 choose to be bound and represented by counsel, and there are no absent class members whose
 7 claims are being settled. *See Brown v. Money Tree Mortgage, Inc.*, 222 F.R.D. 676, 678 (D.
 8 Kan. 2004); *Clougherty v. James Vernor Co.*, 187 F.2d 288, 290 (6th Cir. 1951). Thus, the
 9 reasons for judicial scrutiny of class action settlements are not present in FLSA opt-in
 10 settlements, because absent class members are not bound by the case’s outcome. *Wagner v.*
 11 *Loew’s Theatres, Inc.*, 76 F.R.D. 23, 24-25 (M.D.N.C. 1977). Unlike settlements under Rule 23,
 12 FLSA settlements are not subject to a two-stage process of preliminary approval followed by
 13 final approval, and no final fairness hearing is required. *See Lynn’s Food Stores, Inc. v. United*
 14 *States*, 679 F.2d 1350, 1353-54 (11th Cir. 1982).

15 An employee cannot waive his FLSA claims without approval by the Secretary of Labor
 16 or a district court. *Lynn’s Food Stores*, 679 F.2d at 1353; *Lee v. The Timberland Co.*, 2008 WL
 17 2492295, at *2 (N.D. Cal. June 19, 2008). “[T]he proper procedure for obtaining court approval
 18 of the settlement of FLSA claims is for the parties to present to the court a proposed settlement,
 19 upon which the district court may enter a stipulated judgment only after scrutinizing the
 20 settlement for fairness.” *Lee*, 2008 WL 2492295, at *2 (quotation omitted). In reviewing the
 21 parties’ Settlement here, this Court “must determine whether the settlement is a fair and
 22 reasonable resolution of a bona fide dispute.” *Id.*

23 The Ninth Circuit has held that “[i]f a settlement in an employee FLSA suit does reflect a
 24 reasonable compromise over issues, such as FLSA coverage or computation of back wages, . . .
 25 the district court [may] approve the settlement in order to promote the policy of encouraging
 26 settlement of litigation.” *Id.* (citation omitted); *see also Lynn’s Food Stores*, 697 F.2d at 1355.
 27

1 Here, this Court should approve the parties' settlement because it is a fair and reasonable
 2 compromise of a bona fide dispute between the parties.

3 **1. A Bona Fide Dispute Exists Between the Parties.**

4 As a threshold matter, the Court should conclude that the parties' proposed settlement
 5 represents a resolution of a bona fide dispute. The parties have identified several areas in
 6 dispute. If litigation were to continue, plaintiffs would have to formally move for conditional
 7 collective certification and court-authorized notice, which Cobalt would have contested.
 8 Furthermore, the parties dispute the central merits issues of the case including: (1) whether
 9 putative collective members performed any overtime for which Cobalt did not already pay them;
 10 (2) the amount of unpaid overtime, if any; and (3) whether any violation of the FLSA was
 11 willful. "These disputes show that bona fide issues persist as to the amount of wages, if any, still
 12 owed to the plaintiffs, and that the proposed settlement 'reflects a reasonable compromise over
 13 issues that are actually in dispute... rather than a waiver of statutory rights.'" *See, e.g., Lee,*
 14 2008 WL 2492295, at *2 (bona fide issues include challenge to defendant's exemption
 15 classification of employees and amount of overtime worked).

16 **2. The Settlement is Fair and Reasonable.**

17 There is a "strong presumption in favor of finding a settlement fair." *Velez v. Audio*
 18 *Excellence, Inc.*, 2011 WL 4460110, at *1 (M.D. Fla. Sept. 21, 2011) (citing *Cotton v. Hinton*,
 19 559 F.2d 1326, 1331 (5th Cir. 1977)). The parties' settlement here is very similar to the
 20 settlement Judge Coughenour approved in the *Wheeler* case. Furthermore, four relevant
 21 considerations confirm that this settlement, which arises out of a threatened action for overtime
 22 wages and provides substantial compensation to the opt-in plaintiffs, is fair and reasonable.

23 First, the "Court may presume that no fraud or collusion occurred between counsel, in the
 24 absence of any evidence to the contrary." *Collins v. Sanderson Farms, Inc.*, 568 F. Supp. 2d
 25 714, 725 (E.D. La. 2008). There is no evidence of collusion here. The parties engaged in
 26 discovery and participated in arms-length and good-faith settlement negotiations, including a
 27 mediation with a respected mediator. The final settlement amount was accepted by both parties

1 after engaging in extensive negotiations over the course of a full-day mediation. *See, e.g.*,
 2 *Satchell v. Fed. Exp. Corp.*, 2007 WL 1114010, at *4 (N.D. Cal. Apr. 13, 2007) (“The assistance
 3 of an experienced mediator in the settlement process confirms that the settlement is non-
 4 collusive.”).

5 Second, if litigation were to continue, the parties would likely expend significant
 6 resources due to the complexity and likely duration of the litigation. The parties would engage
 7 in additional discovery and additional motions practice, including motions for conditional
 8 certification and for decertification. This is especially relevant here because Cobalt has ceased
 9 operations, has limited cash available, and the parties’ settlement pays this cash to the putative
 10 class members instead of litigation expenses. Continued litigation would decrease the settlement
 11 funds available to putative class members. *See Garner v. State Farm Mut. Auto. Ins. Co.*, 2010
 12 WL 1687832, at *10 (N.D. Cal. Apr. 22, 2010) (“Settlement avoids the complexity, delay, risk
 13 and expense of continuing with the litigation and will produce a prompt, certain, and substantial
 14 recovery for the Plaintiff class.”) (quotation omitted).

15 Third, the parties engaged in informal discovery prior to engaging in mediation to
 16 determine the reasonableness of the settlement. Cobalt provided plaintiffs’ counsel with detailed
 17 payroll information for all putative collective members. In addition, the parties had various
 18 background information regarding Cobalt’s operations and certain pay practices from the prior
 19 *Wheeler* litigation. The parties therefore entered mediation well informed and prepared to
 20 properly resolve the claims involved.

21 Fourth, plaintiffs were represented by counsel experienced in handling wage and hour
 22 class and collective actions, including actions involving similar job categories. Plaintiffs’
 23 counsel has the experience to assess the risks of continued litigation and benefits of settlement.
 24 Cobalt’s counsel is likewise experienced in defending similar claims. Counsel for both parties
 25 have advised their respective clients regarding the settlement and have recommended judicial
 26 approval thereof. “Great weight is accorded to the recommendation of counsel, who are most
 27

1 closely acquainted with the facts of the underlying litigation.” *Adoma v. Univ. of Phoenix, Inc.*,
2 913 F. Supp. 2d 964, 977 (E.D. Cal. 2012) (quotation omitted).

3 **IV. CONCLUSION**

4 For all of the foregoing reasons, the parties respectfully request that the Court (1) grant
5 the joint motion; (2) certify the FLSA collective as defined above; (3) approve the proposed
6 settlement attached hereto as Exhibit 1; and (4) approve notice to putative collective members in
7 the form attached hereto as Exhibit 2.

8 DATED this 18th day of April, 2016.

9
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13 *Forthcoming*

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CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that on April 21, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to those attorneys of record registered on the CM/ECF system. All other parties (if any) shall be served in accordance with the Federal Rules of Civil Procedure.

DATED this 21st day of April, 2016.

Davis Wright Tremaine LLP
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